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BY EMAIL

State Senator Bob Wieckowski
Senate District 10
State Capitol, Room 4085
Sacramento, CA 95814

Re: Letter of Support for SB 518 (Wieckowski)

Dear Senator Wieckowski:

Our office submits this letter in support of SB 518, the bill introduced by your office to clarify that offers to compromise made under California Code of Civil Procedure § 998 shall not be effective in cases brought under the Public Records Act (“PRA”). As you know, a 998 Offer is a litigation tool that encourages settlement by giving settlement offers “teeth.” If an offer made under Section 998 is rejected, the offering party is entitled to recover its litigation costs in the event rejecting party fails to obtain a better result at trial. While 998 Offers are useful in typical civil cases where money damages are in dispute, in the context of the PRA, there is simply no place for them.

Most troubling, 998 Offers in the PRA context encourage government agencies to use public records and claims of privilege as settlement “bargaining chips” by dangling the promise of the production of public records as a means to avoid paying attorney’s fees where the records have been improperly withheld. Such conduct is fundamentally at odds with the PRA’s promise of open records and protections for governmental privileges. If a record is privileged, an agency has a duty to defend it. If a record is not privileged, the agency has a duty to disclose it upon demand. Agencies should not be permitted to bargain with public records or tell the public that their privileges can be “bought” if they accept a particular monetary award. This is simply bad public policy.

The use of a 998 Offers in the context of a PRA dispute is also a legally-questionable mechanism for a public agency to seek to undermine the PRA’s directive that prevailing litigants shall recover their attorney’s fees. While we do not believe 998 Offers have application to an attorney’s fee award under Government Code §§ 6250 *et. seq.*, this has not stopped public agencies from using them to scare petitioners into prematurely settling legitimate PRA disputes out of fear that they do apply and that they may not “beat” the terms proposed in the offer.

It is also our view that in making 998 Offers, the offering agency is clearly admitting that it is unlawfully withholding records. Upon acceptance of an offer, judgment will be entered by the court confirming the requester's allegation that the subject records were unlawfully withheld. This suggests, in our opinion, that the agency offering these records knows, *or should know*, that they are unlawfully withholding records, since they are proposing to let the court reach that exact conclusion. In such instances, the only thing standing between the requester's access to the records and the court's judgment, is a monetary payment.

These are just a few reasons why the use of 998 Offers should not be permitted in the PRA context. This bill will not only clarify the law in this respect, but it will also significantly reduce the likelihood that good-faith PRA requester will be prevented from pursuing his or her constitutional right to access public records. Thank you for your leadership on this important issue, and for taking action to encourage transparency and open government.

Very truly yours,

A handwritten signature in black ink, appearing to read 'D. Freedman', with a large, stylized 'D' and a long, sweeping horizontal line at the end.

DANIEL FREEDMAN of
Jeffer Mangels Butler & Mitchell LLP